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Gregory P. Magarian

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# POLITICAL AND NON-POLITICAL SPEECH AND GUNS

Gregory P. Magarian\*

## INTRODUCTION

Constitutional rights depend on justifications. Some combination of theory, history, and practical reasoning needs to establish why and to what extent a given right warrants legal protection. The justifications that courts and theorists articulate for a given right determine the right's breadth and the specific contours of its protection. Justification has particular importance at the formative stage of a newly recognized constitutional right. At present, courts are building doctrine around the Second Amendment "right of the people to keep and bear Arms,"<sup>1</sup> recognized as an individual right just over a decade ago in *District of Columbia v. Heller*.<sup>2</sup> Accordingly, this is an opportune time for considering what justifications might support that right.

Many advocates of a strong Second Amendment increasingly lament what they see as courts' insufficiently vigorous enforcement of the right to keep and bear arms. Supreme Court Justice Clarence Thomas has complained repeatedly that courts have "relegate[d] the Second Amendment to a second-class right."<sup>3</sup> Advocates for gun rights level the same charge.<sup>4</sup> To put normative meat on that complaint's positive

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\* Thomas and Karole Green Professor of Law, Washington University in St. Louis. Thanks to participants in the 2019 Symposium, *Constitutional Rights: Intersections, Synergies, & Conflicts*, at the William and Mary Law School and especially to that symposium's architect, Tim Zick. Thanks as well to participants in the 2019 Symposium *Heller at 10* at the University of California–Hastings College of Law.

<sup>1</sup> U.S. CONST. amend. II.

<sup>2</sup> 554 U.S. 570, 581, 589 (2008); *see also* *McDonald v. City of Chicago*, 561 U.S. 742, 742 (2010) (extending the individual Second Amendment right to apply against the states through the Fourteenth Amendment Due Process Clause).

<sup>3</sup> *Friedman v. City of Highland Park*, 136 S. Ct. 447, 450 (2015) (Thomas, J., dissenting from denial of certiorari); *see also* *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting from denial of certiorari) (lamenting "the treatment of the Second Amendment as a disfavored right"); *Voisine v. United States*, 136 S. Ct. 2272, 2292 (2016) (Thomas, J., dissenting).

<sup>4</sup> *See* Ilya Shapiro & Matthew Larosiere, *The Supreme Court Is Too Gun-Shy on the Second Amendment*, WALL ST. J. (Jan. 2, 2019, 6:54 PM), <https://www.wsj.com/articles/the-supreme-court-is-too-gun-shy-on-the-second-amendment-11546473290> [<https://perma.cc/85Q6-3RE3>] (complaining about the "second-class treatment of the Second Amendment"); John Yoo & James C. Phillips, *The Second(-Class) Amendment*, NAT'L REV. (Nov. 19, 2018, 6:30 AM), <https://www.nationalreview.com/2018/11/supreme-court-second-amendment-rights/> [<https://perma.cc/8PH9-NAWT>] ("Far too often for too long, the Second Amendment has been a second-class right, banished to the back of our constitutional bus."). For a catalogue

bones, and following their frequent tendency to press for stronger Second Amendment rights by simple analogies to the First Amendment,<sup>5</sup> gun rights advocates make the specific claim that courts improperly enforce the First Amendment's protections of free expression<sup>6</sup> more vigorously than the Second Amendment's protection of the right to keep and bear arms.<sup>7</sup> I will call this argument—that the First Amendment provides the proper baseline for Second Amendment enforcement—the “parity premise.”

One salient way to analyze the parity premise is to consider the justifications available for First and Second Amendment rights.<sup>8</sup> Courts and scholars have offered multiple and shifting justifications for the First Amendment's expression protections.<sup>9</sup> One familiar, potent justification for constitutional expressive freedom is that a healthy, properly functioning democracy requires protections for speech that relates to democratic self-government.<sup>10</sup> I will refer to that idea as the “political value justification” for First Amendment rights. If the Second Amendment's individual right to keep and bear arms can be justified on similar political value terms, then the parity premise would appear sound. In contrast, if no political value justification supports the Second Amendment, then the parity premise requires some different grounding. Thinking about the political value justification casts alternative, non-political justifications into sharper relief, suggesting which qualities might characterize viable alternatives.

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of the “second-class right” claim in judicial opinions, legal briefs, and the media, see Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1443, 1446–51 (2018).

<sup>5</sup> See, e.g., David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417, 418–20 (2014). For an analysis and critique of gun rights advocates' uses of First Amendment analogies, see Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 61–65, 69–72 (2012).

<sup>6</sup> See generally U.S. CONST. amend. I. My discussion of First Amendment rights refers collectively to the rights of speech, press, assembly, and petition. It does not extend to the Religion Clauses. See *id.*

<sup>7</sup> See, e.g., Charles C.W. Cooke, *Second Amendment Gets Second-Class Treatment*, NRA: AM. 1ST FREEDOM (Feb. 9, 2018), <https://www.americas1stfreedom.org/articles/2018/2/9/second-amendment-gets-second-class-treatment/> [<https://perma.cc/9A99-ZK8V>] (“[W]ere the Second Amendment treated in the same way as is the First Amendment, even the generally non-controversial regulations on the acquisition, transfer and bearing of firearms would be obviated.”).

<sup>8</sup> This Article does not address the empirical question whether courts in fact enforce the Second Amendment less vigorously than the First Amendment. For a refutation of the “second-class right” claim, see JOSEPH BLOCHER & DARRELL A. H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* 185 (2018). For a thorough empirical examination of lower courts' Second Amendment decisions, see Ruben & Blocher, *supra* note 4, at 1443, 1446–51.

<sup>9</sup> Leading surveys of justifications for First Amendment speech rights include VINCENT BLASI, *IDEAS OF THE FIRST AMENDMENT* (2d ed. 2012); THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1966); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982).

<sup>10</sup> See *infra* notes 14–27 and accompanying text.

This Article contends that the political value justification for First Amendment rights cannot be adapted to the Second Amendment.<sup>11</sup> It then distills some central qualities of alternative, non-political justifications for First Amendment rights and explains why the Second Amendment right cannot draw support from similar non-political justifications.<sup>12</sup> My analysis provides strong reason to believe that the parity premise is unsound. The Article closes by suggesting how courts might enforce the Second Amendment more modestly and justifiably to protect not a substantive right but rather an equal right to keep and bear arms.<sup>13</sup>

## I. POLITICAL VALUE AS A JUSTIFICATION FOR FIRST AND SECOND AMENDMENT RIGHTS

### A. *The First Amendment: Political Speech*

Political value justifications for the First Amendment's expressive freedom protections have a long and well-established pedigree. First Amendment theorists from Justice Louis Brandeis<sup>14</sup> through Alexander Meiklejohn<sup>15</sup> and Judge Robert Bork<sup>16</sup> have long contended that the practical demands of democratic politics yield the best, perhaps the only, valid justification for constraining the government's power to regulate expression. In Meiklejohn's classic formulation, self-governing citizens' need for access to all relevant political information compels nearly absolute First Amendment protection, but only for political speech.<sup>17</sup> Later theorists have offered more inclusive variations on the political value justification, invoking democratic self-government to explain the First Amendment's purpose but not to limit its protective scope.<sup>18</sup> The

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<sup>11</sup> See discussion *infra* Part I.

<sup>12</sup> See discussion *infra* Part II.

<sup>13</sup> See discussion *infra* Part III.

<sup>14</sup> See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (describing “[t]hose who won our independence” as believing “that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government”).

<sup>15</sup> See generally ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960).

<sup>16</sup> See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 20–21 (1971).

<sup>17</sup> See MEIKLEJOHN, *supra* note 15, at 24–28 (positing “the traditional American town meeting” as an exemplar of the role expressive freedom plays in democratic self-government).

<sup>18</sup> See C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* 125–26 (2002) (conceptualizing the First Amendment's protection of a free press as instrumental for democracy); ASHUTOSH BHAGWAT, *THE MYTH OF RIGHTS: THE PURPOSES AND LIMITS OF CONSTITUTIONAL RIGHTS* 41–42 (2010) (arguing that the constitutional structure supports an understanding of the First Amendment as protecting a collective right of democratic self-determination); ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 272–74 (1995) (positing the First Amendment as a protection for democratic public discourse and the boundaries of that discourse as necessarily contestable).

logic of political value justification entails particular emphasis on broad participation in public discourse and on protecting the capacity of dissenters to advocate political and social change—a combination of values I have called “dynamic diversity.”<sup>19</sup>

Political value justification has played an important role at every stage in the development of First Amendment doctrine. The nineteenth century controversy over the government’s attempt to silence political opposition through the Alien and Sedition Acts formed the prototype of First Amendment law.<sup>20</sup> Justice Brandeis, along with his colleague Justice Oliver Wendell Holmes, built the template for First Amendment rights in a series of dissents and concurrences where the Supreme Court upheld convictions of anti-war protesters and left-wing activists.<sup>21</sup> *New York Times Co. v. Sullivan*, the cornerstone of the Warren Court’s First Amendment jurisprudence, protected a political advertisement in the name of making public debate “uninhibited, robust, and wide-open.”<sup>22</sup> The Court justified speech protections for a range of speakers including public employees,<sup>23</sup> schoolchildren,<sup>24</sup> and flag burners<sup>25</sup> based on those speakers’ varied contributions to public political debates. More recently, the Roberts Court has emphasized political value to underwrite its First Amendment crusade against campaign finance regulation<sup>26</sup> and its protection of vitriolic protests at military funerals.<sup>27</sup> Political value justification forms a crucial part, perhaps the dominant part, in judicial and academic explanations for constitutional expressive freedom.

Even as political value has provided a paradigmatic justification for constitutional speech protection, political potency also defines important limits on that protection—a

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<sup>19</sup> See GREGORY P. MAGARIAN, *MANAGED SPEECH: THE ROBERTS COURT’S FIRST AMENDMENT*, at xvi–xx (2017) (defining and explaining dynamic diversity).

<sup>20</sup> See generally TERRI DIANE HALPERIN, *THE ALIEN AND SEDITION ACTS OF 1798: TESTING THE CONSTITUTION* (2016) (examining the Alien and Sedition Acts and the controversy that caused).

<sup>21</sup> See *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 624, 628 (1919) (Holmes, J., dissenting).

<sup>22</sup> 376 U.S. 254, 270 (1964).

<sup>23</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (establishing presumptive First Amendment protection when a public employee speaks “as a citizen, in commenting upon matters of public concern”).

<sup>24</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–11 (1969) (establishing presumptive First Amendment protection for public school students’ speech where students wore black armbands to protest the Vietnam War).

<sup>25</sup> See *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (establishing First Amendment protection for flag burning performed as part of a political protest).

<sup>26</sup> See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 354 (2010) (emphasizing, in establishing First Amendment protection for corporate electoral expenditures, the political importance of corporate voices).

<sup>27</sup> See *Snyder v. Phelps*, 562 U.S. 443, 451–58 (2011) (positing the “public concern” character of military funeral protests as the basis for a First Amendment limit on tort liability for intentional infliction of emotional distress).

sort of First Amendment anti-matter. Paladins of political stability have warned of the First Amendment as a “suicide pact,” a liberal democratic weapon that might doom liberal democracy itself.<sup>28</sup> Likewise, defenders of expressive freedom have sometimes suggested that First Amendment protection should hinge on the incapacity of speech to bring about actual change.<sup>29</sup> The Supreme Court initiated First Amendment law by letting the federal and state governments punish a succession of political dissenters.<sup>30</sup> That tendency reached its nadir during the Cold War, when the Court upheld federal convictions of Communist Party leaders for the crime of teaching and advocating communist ideas.<sup>31</sup> The Court eventually reversed course, announcing strong First Amendment protection for any political advocacy short of incitements to imminent violence.<sup>32</sup> Our present, seemingly boundless “War on Terror” has swung the pendulum back in a restrictive direction, apparent in the Roberts Court’s approval of a federal bar on activists’ efforts to teach foreign terrorist organizations about nonviolent conflict resolution.<sup>33</sup> The incitement doctrine’s focus on imminent action and the Court’s intermittent queasiness about vigorous political dissent reflects what I’ll call the “flashpoint problem.” Courts protect challenges to the political status quo as long as those challenges hold the form of speech. At some point, however, speech reaches a flashpoint that causes action—in extreme cases, physical insurrection. The incitement doctrine aims to protect political speech up to the flashpoint while enabling government restrictions past the flashpoint.<sup>34</sup>

Despite the importance of political speech in First Amendment theory, political value has never prevailed as an exclusive justification for a robust First Amendment. People value freedom to participate not just in discourse about democratic self-government but also in discourse about art, science, sex, recreation, commerce, and more.<sup>35</sup> Professor Meiklejohn eventually broadened his strict political conception of

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<sup>28</sup> The “suicide pact” admonition appears to have originated with Justice Robert Jackson. See *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

<sup>29</sup> See, e.g., *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) (arguing that “the surreptitious publishing of a silly leaflet by an unknown man” did not meet the “clear and present danger” standard for punishing speech).

<sup>30</sup> See *Whitney v. California*, 274 U.S. 357, 367–72 (1927) (affirming a conviction under a state criminal syndicalism statute for advocating violent overthrow of the government); *Gitlow v. New York*, 268 U.S. 652, 664–68 (1925) (affirming another state criminal syndicalism conviction); *Schenck v. United States*, 249 U.S. 47, 51–53 (1919) (affirming a federal conviction for advocating resistance to military recruiting and enlistment); *Abrams*, 250 U.S. at 621–24 (affirming a federal conviction for advocating interference with munitions production).

<sup>31</sup> See *Dennis v. United States*, 341 U.S. 494, 501–02 (1951) (plurality opinion).

<sup>32</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (per curiam).

<sup>33</sup> See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28–32 (2010).

<sup>34</sup> See *Brandenburg*, 395 U.S. at 447.

<sup>35</sup> See *Miller v. California*, 413 U.S. 15, 22–23 (1973) (“[F]or in the area of freedom of speech and press the Courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression.”).

First Amendment protection to include artistic and cultural expression.<sup>36</sup> Judge Bork, writing at the outset of a half-century (and counting) of conservative judicial ascendancy, insisted that only a political justification could maintain “neutral” judicial legitimacy and prevent unprincipled judicial expansion of First Amendment rights.<sup>37</sup> His fellow conservatives, however, have ignored his admonition. The Supreme Court in the past half century has extended First Amendment protection to commercial advertising,<sup>38</sup> pornography,<sup>39</sup> self-serving lies,<sup>40</sup> and numerous other forms of non-political speech.<sup>41</sup> The Roberts Court—despite the political pieties of its campaign finance jurisprudence—has shaped a First Amendment far more sensitive to commercial profit than to political dissent.<sup>42</sup> The political value justification for expressive freedom retains force, but the evolution of First Amendment law has required additional, non-political justifications.

### *B. The Second Amendment: Resistance to Tyranny*

The Second Amendment right to keep and bear arms historically rests on a political value theory with striking parallels to the political value justification for First Amendment speech protections. The theory holds that the Second Amendment protects the right to keep and bear arms for the purpose of resisting the federal government should it devolve into tyranny.<sup>43</sup> The political value justification for Second Amendment rights has strong foundations in the Second Amendment’s text and history.<sup>44</sup> Textually, the Second Amendment’s preamble—“A well regulated Militia, being necessary to the security of a free State”—animates the amendment’s declarative clause: “the right of the People to keep and bear Arms, shall not be infringed.”<sup>45</sup> As I have argued elsewhere, the textual structure and substance compel

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<sup>36</sup> See MEIKLEJOHN, *supra* note 15, at 117.

<sup>37</sup> See Bork, *supra* note 16, at 20–28.

<sup>38</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 (1976) (establishing First Amendment protection for commercial speech).

<sup>39</sup> See, e.g., *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 332–34 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986) (striking down a municipal ban on certain nonobscene pornography).

<sup>40</sup> See *United States v. Alvarez*, 567 U.S. 709, 715–23 (2012) (plurality opinion) (striking down a federal statute that criminalized false claims of military honors).

<sup>41</sup> See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 804–05 (2011) (striking down a California statute that barred minors from renting violent video games). For a more extensive discussion of First Amendment protection for non-political speech, see Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 251–81 (2005).

<sup>42</sup> I develop this argument in MAGARIAN, *supra* note 19, at 33–64.

<sup>43</sup> See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 47 (1998).

<sup>44</sup> See Magarian, *supra* note 5, at 83–87.

<sup>45</sup> U.S. CONST. amend. II.

a collectivist understanding of the right to keep and bear arms, and the most apt collectivist justification is resistance to tyranny.<sup>46</sup> A formidable body of legal and historical scholarship makes a convincing case that the Second Amendment in fact emerged from a civic republican vision of popular resistance to tyrannical government.<sup>47</sup> In David Williams' compelling account, the amendment's Framers meant to enable "the body of the people" to rise up collectively in arms should the federal government become oppressive.<sup>48</sup>

The most intellectually potent challenge to the political value theory of Second Amendment rights has come from one of that theory's leading architects. Akhil Amar builds a convincing historical argument that the imperative to enable resistance to tyranny animated the Second Amendment.<sup>49</sup> Amar proceeds to argue that the adoption of the Fourteenth Amendment fundamentally changed the constitutional meaning of the right to keep and bear arms.<sup>50</sup> In his account, the Framers of that Reconstruction Amendment were liberals, not civic republicans.<sup>51</sup> Changed circumstances and evolved ideals caused them to care less about the people's capacity to overthrow tyranny by force of arms.<sup>52</sup> Instead, the Reconstruction generation cared about personal self-defense, particularly African Americans' capacity to protect themselves against racist violence.<sup>53</sup> Given the theoretical shift wrought by the Fourteenth Amendment, Amar argues, a proper contemporary understanding of the Second Amendment should recognize personal self-defense as the primary focus of the constitutional right to keep and bear arms.<sup>54</sup>

Amar's account carries considerable historical force, but his argument runs into trouble when it turns to legal analysis. The heart of the problem lies in the Second Amendment's preamble. However archaic the Fourteenth Amendment's Framers may have considered the civic republican ideal of popular resistance to tyranny, the Second Amendment's Framers wrote that ideal into the constitutional text. The Fourteenth Amendment left the preamble in place and its meaning in force. Amar makes strong arguments that the Fourteenth Amendment compels changes in how we construe other constitutional rights.<sup>55</sup> None of those other rights, however, comes

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<sup>46</sup> See Magarian, *supra* note 5, at 83–87.

<sup>47</sup> Leading elaborations of this insight include AMAR, *supra* note 43, at 46–59; SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 3–5 (2006); DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* 9 (2003).

<sup>48</sup> WILLIAMS, *supra* note 47, at 46–49 (explaining the constitutional conception of the citizen militia as consisting of the body of the people).

<sup>49</sup> See AMAR, *supra* note 43, at 47–48.

<sup>50</sup> See *id.* at 258–59.

<sup>51</sup> See *id.* at 258.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.* at 259.

<sup>54</sup> See *id.* at 258–60.

<sup>55</sup> See *id.* at 231–57, 268–83 (examining changes to the freedoms of expression and religion).

with any textual anchor like the Second Amendment's preamble. For example, we can fairly unmoor the Establishment Clause from its apparent original purpose of protecting state religious establishments against federal encroachment, and instead incorporate that clause against the states through the Fourteenth Amendment.<sup>56</sup> Nothing in the First Amendment's text bars that shift. The Second Amendment's text does not work the same way.

Just as the preamble's presence in the Second Amendment undercuts Amar's argument, so does the absence of any language about personal self-defense. No principle of constitutional interpretation supports enforcing a norm of personal self-defense when that norm gets no mention in either the original or amended constitutional text. "[W]here, precisely," Amar asks, "does the Fourteenth Amendment work its noteworthy rewriting of the arms right and the inscription of the civil rights-political rights distinction?"<sup>57</sup> He never gives a specific answer, let alone a satisfying one. Highlighting a Reconstruction-era political tract, he proclaims: "[I]f we listen closely, we can . . . hear in these words the subtle privatization of the Second Amendment." Rhetorical echoes, however, aren't constitutional law. Presumably having considered this problem, Amar later suggested that a constitutional right of armed personal self-defense might emerge not from the incorporated Second Amendment but organically from the Fourteenth Amendment clause that protects "privileges or immunities of citizens of the United States"<sup>58</sup> against encroachments by the states.<sup>59</sup> That approach—using a nearly dead constitutional provision<sup>60</sup> to protect an unenumerated revision of an enumerated right—would be unprecedented and problematic. Other advocates of a self-defense right have shown little interest in trading the Second Amendment's specific but problematic text for whatever may lie behind door number Fourteen.

Beyond its textual problems, Amar's argument for a constitutional right of individual self-defense also raises substantive concerns. While he musters strong evidence that the Reconstruction Congress was concerned about African Americans' physical safety from racist attackers,<sup>61</sup> a wide chasm separates that concern from the conclusion that any United States government would constitutionalize a deliberate regime of black violence against white men. The river of our history roars against that racially progressive narrative.<sup>62</sup> Even if we accept Amar's historical premise, the political valence of personal self-defense has changed markedly since Reconstruction. In our

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<sup>56</sup> See *id.* at 246–54 (discussing the Establishment Clause and the Fourteenth Amendment).

<sup>57</sup> *Id.* at 259.

<sup>58</sup> U.S. CONST. amend. XIV, § 1, cl. 2.

<sup>59</sup> See Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 907–11.

<sup>60</sup> The Supreme Court eviscerated the Privileges or Immunities Clause in *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 76–77 (1873).

<sup>61</sup> See Amar, *supra* note 59, at 899–900.

<sup>62</sup> See generally, e.g., TERENCE FINNEGAN, *A DEED SO ACCURSED: LYNCHING IN MISSISSIPPI AND SOUTH CAROLINA, 1881–1940* (2013).

era, political veneration of armed self-defense often carries an unmistakable odor of white fear about supposed black crime against white victims.<sup>63</sup> We should not take a doctrine intended to protect African Americans and redeploy it in a way that might serve to excuse violence against them.<sup>64</sup>

Where Amar's intellectually formidable attack on the political value justification for Second Amendment rights failed, the Supreme Court's considerably weaker attack in *District of Columbia v. Heller* succeeded, because the Court has the power to inscribe its mistakes and biases in law. In analyzing the Second Amendment's preamble, the *Heller* majority acknowledged (even as it de-emphasized) the anti-tyranny theory.<sup>65</sup> However, the Court proceeded both to relegate the preamble to "explanatory" status<sup>66</sup> and to insist that the Second Amendment's Framers cared more about personal self-defense than about any function of the "well regulated Militia."<sup>67</sup> Neither of those moves makes much sense. As to the preamble, why would the authors of the Bill of Rights provide an explanation for the right to keep and bear arms—as they did for no other right—without intending or believing that the explanation would have some bearing on that right's legal scope and force?<sup>68</sup> As to the historical context, no substantial evidence supports a personal self-defense justification for the Second Amendment, while copious evidence supports the anti-tyranny justification.<sup>69</sup> *Heller* exemplifies the tendency of the Supreme Court under Chief Justice

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<sup>63</sup> See WILLIAMS, *supra* note 47, at 183–85, 188 (documenting repeated racist appeals related to self-defense by National Rifle Association leaders Wayne LaPierre and Charlton Heston); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 228–30, 232–33 (2008) (documenting racialized rhetoric about crime and self-defense in the recent gun rights movement).

<sup>64</sup> The Supreme Court has turned other racially progressive constitutional principles toward racially regressive legal ends. See *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 630–32 (1993) (invoking the Equal Protection Clause bar on racial discrimination to restrict the government's power to implement race-conscious remedies that increase opportunities for members of historically disadvantaged racial groups); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 267 (1978) (plurality opinion) (same).

<sup>65</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 597 (2008) (listing resistance to tyranny third among three ways in which the Framers thought of the militia as "necessary to the security of a free State"); *id.* at 600 (recognizing the Second Amendment as "assur[ing] the existence of a 'citizens' militia' as a safeguard against tyranny").

<sup>66</sup> See *id.* at 598–600 (describing the subordinate, explanatory relationship of the Second Amendment's preamble to the operative clause); see also MARK V. TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS* 25–26 (2007) (arguing that, under "[t]he best individual-rights interpretation" of the Second Amendment, the preamble "explains why the Constitution contains the right . . . but doesn't impose conditions on exercising the right").

<sup>67</sup> See U.S. CONST. amend. II; *Heller*, 554 U.S. at 599 (dismissing the preamble as relevant only to "the [Second Amendment] right's codification" and calling self-defense "the central component of the right itself").

<sup>68</sup> See Magarian, *supra* note 5, at 78–79.

<sup>69</sup> See David C. Williams, *Death to Tyrants: District of Columbia v. Heller and the Uses of*

Roberts to resolve constitutional rights disputes by reference to history and tradition.<sup>70</sup> The majority's reasoning vividly illustrates the malleability of that approach.<sup>71</sup>

The *Heller* Court's short-circuiting of the political value justification for the individual right to keep and bear arms is as understandable as it is artless. The trouble with the political value justification for the First Amendment is that, in the view of many or most people, it does not go far enough in protecting expression.<sup>72</sup> In sharp contrast, the trouble with the political value justification for the Second Amendment is that—in the view of just about everyone, including many advocates for gun rights—it goes too far in protecting guns.<sup>73</sup> The anti-tyranny justification for the right to keep and bear arms, in present circumstances, presents at least three problems.

First, armed resistance to tyranny presents a literally weaponized variation on the First Amendment flashpoint problem. Guns pose a far more immediate threat of violence in most contexts than words ever do. True, an unfired gun produces no more physical damage than a pamphlet or an utterance. The ordinary operation of speech, however, does not entail even potential violence.<sup>74</sup> Words do what they do without directly causing any physical damage.<sup>75</sup> Guns, in contrast, are designed for violence. Their power remains latent until it causes physical harm. Policing the political First Amendment's flashpoint boundary is challenging.<sup>76</sup> Policing the political Second Amendment's flashpoint boundary risks catastrophe. We might lower the stakes of the Second Amendment flashpoint by restricting the sorts of arms that people have a constitutional right to keep and bear, but that solution—the approach of the *Heller* Court—sells out the anti-tyranny justification entirely.<sup>77</sup> If we want an armed citizenry capable of bringing down a rogue U.S. government, then all Americans should have a right to keep and bear military weapons.<sup>78</sup> Almost nobody appears to want that.

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*Guns*, 69 OHIO ST. L.J. 641, 652–53 (2008) (sharply criticizing the *Heller* Court's ahistorical sublimation of the anti-tyranny justification in favor of the self-defense justification).

<sup>70</sup> See *Town of Greece v. Galloway*, 572 U.S. 565, 583–84, 587–88 (2014) (using a tradition-based analysis to reject an Establishment Clause challenge to a municipal legislative prayer); *United States v. Stevens*, 559 U.S. 460, 468–72 (2010) (using a tradition-based analysis to sustain a free speech challenge to a federal ban on videos that depict animal cruelty).

<sup>71</sup> For a critique of the Roberts Court's tradition-based methodology in the free speech context, see MAGARIAN, *supra* note 19, at 13–15.

<sup>72</sup> See *supra* notes 35–42 and accompanying text.

<sup>73</sup> Cf. Megan Brenan, *Ten Takeaways About American's Views of Guns*, GALLUP (May 2, 2018), <https://news.gallup.com/opinion/polling-matters/233627/ten-takeaways-americans-views-guns.aspx> [<https://perma.cc/HN33-KY5A>]; Lydia Saad, *Gallup's Guide to U.S. Public Opinion on Guns*, GALLUP (Aug. 5, 2019), <https://news.gallup.com/opinion/gallup/262724/gallup-guide-public-opinion-guns.aspx> [<https://perma.cc/W7AM-AVPX>].

<sup>74</sup> See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 55 (1989).

<sup>75</sup> See, e.g., *id.* at 54–56 (distinguishing speech from conduct on the ground that speech ordinarily operates in a nonviolent and noncoercive manner).

<sup>76</sup> See cases cited *supra* notes 32–33 and accompanying text.

<sup>77</sup> See *Heller*, 554 U.S. at 627–28 (acknowledging the government's power to ban private ownership of military weapons).

<sup>78</sup> See Williams, *supra* note 69, at 660–62.

Second, the political Second Amendment presents a collective action problem. Expression is pluralist and interactive.<sup>79</sup> Numerous people, groups, and institutions are constantly engaged in political (and for that matter cultural, scientific, and commercial) discourse. The multifarious, multidirectional character of communication is part of what gives speech its political value. Ideas bounce around our political ecosystem in unpredictable directions, recombining and mutating as they reach different audiences and undergo fresh iterations. As a result, speech constantly fuels political change in numerous large and small ways. In contrast, the anti-tyranny justification for the Second Amendment contemplates one cataclysmic political goal: armed revolution.<sup>80</sup> To accomplish that goal, the anti-tyranny justification demands a sort of concerted action that no one seriously believes possible.<sup>81</sup> The Second Amendment's preamble conceptualizes the "Militia" as congruent with "the people" in the Amendment's declarative clause.<sup>82</sup> The Framers believed that the people as a collective would recognize tyranny and would then rise up in the form of the militia to defeat tyranny by force of arms.<sup>83</sup> For the Second Amendment to serve its defining political purpose, today's far larger and more heterogeneous society would need to find some way of reconstituting the real or imagined civic unity of the revolutionary era.<sup>84</sup>

Finally, the political Second Amendment presents a problem of incongruence. The people likeliest to be armed are the people who would seem least inclined to raise those arms against a tyrannical government. In our current political culture, with its sharp polarizations along lines of race, sex, and class, gun owners predominantly share the demographic characteristics of the people who hold the most political power—white,<sup>85</sup> male,<sup>86</sup> and relatively affluent.<sup>87</sup> In addition, most gun owners are politically conservative.<sup>88</sup> Substantial social science evidence indicates that political

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<sup>79</sup> See BAKER, *supra* note 74, at 54–55.

<sup>80</sup> See Williams, *supra* note 69, at 658–60.

<sup>81</sup> See *id.* at 660 ("The outcome of *Heller* is thus strange but clear: the people have the right to own arms, and to use them in resistance, but not to prepare before the fact for resistance. Apparently they will just spontaneously turn out.").

<sup>82</sup> See U.S. CONST. amend. II.

<sup>83</sup> See Williams, *supra* note 69, at 668.

<sup>84</sup> See WILLIAMS, *supra* note 47, at 295–301 (discussing the viability of redeeming the founding-era ideal of "the people").

<sup>85</sup> According to a Pew Research Center report on gun ownership among U.S. adults—using that report's terminology—36% of Whites, 24% of Blacks, and 15% of Hispanics personally owned guns in 2017. See KIMPARKER ET AL., PEW RES. CTR., AMERICA'S COMPLEX RELATIONSHIP WITH GUNS 18 (2017), <https://www.pewsocialtrends.org/2017/06/22/the-demographics-of-gun-ownership/> [<https://perma.cc/8XWG-74CY>].

<sup>86</sup> See *id.* (stating that 39% of men and 22% of women personally own guns).

<sup>87</sup> See *Share of Households That Own a Firearm in the United States in 2019, by Household Income*, STATISTA (2019), <https://www.statista.com/statistics/625177/firearm-ownership-rate-by-household-income-us/> [<https://perma.cc/V5JK-ZBSA>] (finding the following correlations between household income and percentage of households that owned guns in 2014: less than \$25,000, 18.2%; \$25,000–\$49,999, 32.1%; \$50,000–\$89,999, 41.8%; \$90,000 and above, 44%).

<sup>88</sup> See PARKER ET AL., *supra* note 85, at 12 (indicating that 44% of Republicans and

conservatives tend to view authority more sympathetically than nonconservatives do.<sup>89</sup> Thus, the people with the greatest capacity to take up arms against the government—which is not to say any substantial capacity—have strong affinities and tendencies that would discourage them from doing so. This incongruence critique, of course, indulges several broad generalizations. In finer grain, our political community includes powerful women of color, progressive gun owners, anti-authoritarian conservatives, and people whose politics do not track polarities of race, sex, or class. Still, the anti-tyranny justification for the right to keep and bear arms requires armed resistance to tyranny on a mass scale, and that premise gives broad generalizations analytic weight. Thus, even aside from the flashpoint and collective action problems, we have strong reasons to doubt that the Second Amendment could facilitate the recognition and overthrow of a tyrannical U.S. government.

The problems with the anti-tyranny argument for the individual right to keep and bear arms mean that the parity premise—the view that courts should enforce First and Second Amendment rights with the same vigor—cannot rest on a political value justification. Instead, the parity premise needs support from some non-political justification. First Amendment law and theory can help us to identify and evaluate alternative, non-political justifications for the Second Amendment.

## II. NON-POLITICAL VALUE AS A JUSTIFICATION FOR FIRST AND SECOND AMENDMENT RIGHTS

### *A. The First Amendment: Social Relation Speech*

First Amendment law's rejection of a strict political value limitation reflects an important insight that most speech concerns not political processes, but rather what we can broadly call social relations—interactions between and among private individuals and entities—and that this mass of social relation speech has great value.

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Republican-leaning independents own guns, while 20% of Democrats and Democratic leaning independents own guns); see also Kim Parker, *Among Gun Owners, NRA Members Have a Unique Set of Views and Experiences*, PEW RES. CTR. (July 5, 2017), <https://www.pewresearch.org/fact-tank/2017/07/05/among-gun-owners-nra-members-have-a-unique-set-of-views-and-experiences/> [<https://perma.cc/NL83-PKAP>] (stating that 61% of all gun owners are Republicans or Republican leaners).

<sup>89</sup> Studies that link conservatism and authoritarianism include William F. Stone & Laurence D. Smith, *Authoritarianism: Left and Right*, in STRENGTH AND WEAKNESS: THE AUTHORITARIAN PERSONALITY TODAY 14 (William F. Stone et al. eds., 1993); John T. Jost et al., *Political Conservatism as Motivated Social Cognition*, 129 PSYCH. BULL. 339 (2003). Critics have argued that measures used to establish the conservative-authoritarian relationship are predisposed to find that relationship. See Jesse Singal, *How Social Science Might Be Misunderstanding Conservatives*, INTELLIGENCER (July 15, 2018), <http://nymag.com/intelligencer/2018/07/how-social-science-might-be-misunderstanding-conservatives.html> [<https://perma.cc/WWH9-XEWW>] (discussing critiques of studies that find a relationship between conservatism and authoritarianism).

Two familiar justifications generally support the expansion of First Amendment rights beyond speech with political value to encompass social relation speech. First, in Justice Holmes' classic formulation, constitutional speech protection provides "the best test of truth" by measuring "the power of [a] thought to get itself accepted in the competition of the market."<sup>90</sup> The essence of Holmes' truth theory prefigures the logic of Meiklejohn's political value justification for speech protection: If people have access to more information, they can use it to achieve better outcomes. Holmes, though, does not limit that logic to matters of politics. Second, constitutional speech protection can promote various conceptions of individual autonomy and personal fulfillment.<sup>91</sup> I will call these the "truth" and "autonomy" justifications for protecting social relation speech.

The greatest strength of the truth and autonomy justifications, compared to a political value justification for speech protection, lies in their breadth. Both justifications encompass the full range of subject matters in social relation speech. The breadth of these justifications, however, also presents a problem. All human activity, expressive and otherwise, can help us discover truth and promote our self-fulfillment and autonomy.<sup>92</sup> If truth and autonomy values can justify constitutional speech protection, they would also seem to require protecting nonexpressive activity that promotes those values. Free speech theory deals with this problem by positing an essential, categorical distinction between speech and action.<sup>93</sup> Distinguishing expression from action, however, becomes very hard very quickly. Expression is a form of action; all action has expressive content. Inevitably, then, the speech-action distinction requires normative content.<sup>94</sup> The normative qualification of protected speech is complicated, contentious, and multifaceted. I will focus on two criteria that appear important for how and why First Amendment law draws the lines it does between protected social relation speech and unprotected action.

First, the law appears to view social relation speech as more likely than nonexpressive activity to do more social good than harm. I will call this the "benefit criterion." Empirically measuring the costs and benefits of social relation speech is likely impossible. For better and worse, though, First Amendment doctrine generally rests not on empirical testing but on broad normative presumptions.<sup>95</sup> The presumption behind the benefit criterion—that expression generally does more good and less harm than nonexpressive action—is both facially reasonable and integral to First Amendment doctrine. Of course speech can cause harm, and First Amendment law likely

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<sup>90</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>91</sup> See generally BAKER, *supra* note 74 (articulating and defending a "liberty theory" of constitutional speech protection).

<sup>92</sup> See STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO* 102–05 (1994).

<sup>93</sup> See Magarian, *supra* note 5, at 55.

<sup>94</sup> See FISH, *supra* note 92, at 103–05.

<sup>95</sup> See Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3–4.

underestimates the extent of that harm.<sup>96</sup> Expression, however, is essential for virtually every socially desirable process and interaction.<sup>97</sup> Speech brings societal benefits in a dizzying variety of ways, such as forming personal bonds, generating artistic and cultural materials, and educating. All of these benefits from speech also produce substantial positive externalities. If we want a flourishing society, then we must want substantial freedom for social relation speech.

In First Amendment law, virtually every boundary that separates protected speech from unprotected speech—and by extension from nonexpressive conduct—can readily be understood as grounded in an accounting of benefits and harms.<sup>98</sup> The categorical doctrines that deny protection to fighting words,<sup>99</sup> obscenity,<sup>100</sup> and defamation;<sup>101</sup> the interest balancing that lets the government regulate even presumptively protected speech for sufficiently strong reasons<sup>102</sup>—all of these doctrines, again for better and worse, appear to set First Amendment boundaries based on free expression's relative benefits.

Second, the capacity to express and receive information is one to which most people and groups start out, prior to social and legal interventions, with roughly equal access. I will call this the “equality criterion.” Obvious and important limits exist to the equality criterion's salience for the First Amendment. Some people can speak more effectively than others, and some people can process information better. Education dramatically affects people's capacity to participate effectively in public discourse, and some people can buy much better education than others.<sup>103</sup> Likewise, technology

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<sup>96</sup> See generally Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81 (2011) (discussing the role of courts in downplaying the harms of speech).

<sup>97</sup> See C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964, 965 (1978).

<sup>98</sup> The Supreme Court's earliest decision of a free speech claim created the prototype for this benefit-harm formulation in letting the government punish speech that presents a “clear and present danger” of bringing about some legally cognizable harm. *Schenck v. United States*, 247 U.S. 47, 52 (1919).

<sup>99</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (defining the unprotected speech category of “fighting words” as “utterances [that] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”).

<sup>100</sup> See *Miller v. California*, 413 U.S. 15, 24 (1973) (letting states ban certain sexually explicit expression but stating a First Amendment exception for expression with “serious literary, artistic, political, or scientific value”).

<sup>101</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that, because of the public's interest in robust debate on matters of public concern, the First Amendment lets public officials recover tort damages for defamatory speech only where the publication reflects “actual malice”).

<sup>102</sup> See, e.g., *McCullen v. Coakley*, 573 U.S. 464, 486–92 (2014) (holding that a state's restriction on speech around abortion clinics restricted more speech than necessary to achieve the government's legitimate interests in public safety and ensuring access to clinics).

<sup>103</sup> See Lindsey Cook, *U.S. Education: Still Separate and Unequal*, U.S. NEWS & WORLD

provides powerful tools for amplifying voices and gathering more information, and some people can buy more powerful speech-amplifying and information-gathering technology than others.<sup>104</sup> My modest claim is that the capacity for what First Amendment law counts as speech is in general more broadly accessible than the capacity for what the law discounts as nonexpressive action. Doing most things in an effective or rewarding manner requires, from the outset, physical strength, material resources, or both. Whatever nonexpressive activities any of us can or cannot do effectively, the vast majority of us are born with roughly the same capacities to speak and listen. These shared capacities can, and often do, enable reasonably fair arguments between the otherwise weak and strong.

Certain aspects of First Amendment law promote expressive equality. The public forum doctrine, notwithstanding its many flaws, flows from the imperative to maintain a measure of equality in speakers' and listeners' access to expressive capacities.<sup>105</sup> The bar on wholesale closures of expressive media reflects the same tendency, especially when courts recognize the particular importance of low-cost expressive media.<sup>106</sup> One way to understand First Amendment law's allowances of punishments for incitements<sup>107</sup> and fighting words<sup>108</sup> is that those modes of expression effectively cross over into the realm of unprotected action when they succeed in leveraging generally accessible rhetorical power to foment generally inaccessible physical coercion. In Justice Brandeis's formulation: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."<sup>109</sup> However, the U.S. Supreme Court since the 1970s has increasingly turned First Amendment law into a counter-egalitarian force, even in the non-political sphere. Free speech doctrine increasingly underprotects underfunded and socially marginal speakers<sup>110</sup> while overprotecting

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REP. (Jan. 28, 2015, 12:01 AM), <https://usnews.com/news/blogs/data-mine/2015/01/28/us-education-still-separate-and-unequal> [<https://perma.cc/H5C4-SPU3>].

<sup>104</sup> See generally KAREN MOSSBERGER ET AL., *VIRTUAL INEQUALITY: BEYOND THE DIGITAL DIVIDE* (2003).

<sup>105</sup> See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 556–58 (1965) (invoking the First Amendment to strike down a state's arbitrary application to civil rights protesters of a statutory restriction on obstructing a public sidewalk).

<sup>106</sup> See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994) (emphasizing, in sustaining a First Amendment challenge to a broad municipal ban on residential window signs, the low cost of signs as a communication medium).

<sup>107</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (imposing a First Amendment bar on punishment of advocacy "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

<sup>108</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–74 (1942) (rejecting a First Amendment challenge to a conviction for shouting epithets and insults at another person).

<sup>109</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

<sup>110</sup> See, e.g., *Golan v. Holder*, 565 U.S. 302, 303–05 (2012) (rejecting a First Amendment challenge to a federal copyright law that removed certain works from the public domain).

wealthy and powerful speakers.<sup>111</sup> From the standpoint of the equality premise, this legal creation and exacerbation of expressive inequalities represents a distortion of how constitutional expressive freedom should work.

*B. The Second Amendment: Personal Self-Defense*

The Supreme Court in *District of Columbia v. Heller* proclaimed personal self-defense “the core lawful purpose” protected by the individual Second Amendment right to keep and bear arms.<sup>112</sup> I have contended that the self-defense justification for the Second Amendment right does not make much sense based on the constitutional text and the Second Amendment’s historical context.<sup>113</sup> Whatever the force of that critique, *Heller* is the law. *Heller* also echoes public opinion polling that shows most people in the United States favor an individual right to keep and bear arms,<sup>114</sup> a confluence that gun rights supporters often posit as salient for constitutional law.<sup>115</sup> The question for evaluating the parity premise is whether the value of individual self-defense provides a credible alternative to the anti-tyranny value as a basis for vigorous judicial enforcement of the Second Amendment.

The truth and autonomy justifications for First Amendment rights cannot directly support constitutional protection for the right to keep and bear arms or for any other nonexpressive activity. Those justifications work for constitutional expressive freedom only because First Amendment law draws a conceptual distinction between speech and action.<sup>116</sup> If that distinction means anything at a descriptive level, it must mean that keeping and bearing arms is action rather than speech.<sup>117</sup> The benefit and

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<sup>111</sup> See, e.g., *Pacific Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 1–2 (1986) (sustaining a First Amendment challenge to a state law that required a public utility to include in its mailings to customers a consumer advocacy group’s messages).

<sup>112</sup> *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008).

<sup>113</sup> See *supra* notes 67–69 and accompanying text.

<sup>114</sup> See Jeffrey M. Jones, *Americans in Agreement with Supreme Court on Gun Rights*, GALLUP (June 26, 2008), <https://news.gallup.com/poll/108394/americans-agreement-supreme-court-gun-rights.aspx> [<https://perma.cc/4XCR-XFFD>] (reporting polling data at the time the Supreme Court decided *Heller* that seven in ten respondents believed the Second Amendment protected an individual right to keep and bear arms and that a similar percentage opposed a legal ban on handguns). Public sentiment appears to have held steady. See PARKER ET AL., *supra* note 85, at 61 (reporting that 72% of U.S. adults in 2017 believed that “most people” or “almost everyone” should be legally allowed to own guns).

<sup>115</sup> See, e.g., Glenn H. Reynolds & Brannon P. Denning, Response, *How to Stop Worrying and Learn to Love the Second Amendment: A Reply to Professor Magarian*, 91 TEX. L. REV. 89, 99 (2013) (praising the *Heller* Court for having “finally caught up with public opinion” and for “ratif[ying] a popular constitutional understanding” as to the desirability of constitutional protection for an individual Second Amendment right focused on armed self-defense). For a critique of this “popular constitutionalism” approach to the Second Amendment, see Siegel, *supra* note 63, at 191–95.

<sup>116</sup> See *supra* notes 93–94 and accompanying text.

<sup>117</sup> See Magarian, *supra* note 5, at 55.

equality criteria, however, provide normative grounds for distinguishing speech from action.<sup>118</sup> Those same criteria might underwrite justifications for constitutionally protecting categories of nonexpressive conduct like armed self-defense. In order to figure out whether the Second Amendment right to keep and bear arms can rest on anything like the same sort of non-political justifications that underwrite First Amendment protection for non-political speech, this section considers whether the *Heller* self-defense justification for the right to keep and bear arms can satisfy the benefit and equality criteria.

### 1. The Benefit Criterion

I suggested above that the First Amendment's broad protection for social relation speech draws normative force from our legal culture's assumption that free expression brings greater social benefits than social harms.<sup>119</sup> The benefit criterion seems very difficult to square with the basic reality of firearms. Expression, as noted above, is integral to virtually every sort of societal interaction. Despite the wide range of good and bad purposes it can serve, speech is essentially constructive. Guns, in contrast, are essentially destructive. The purpose of guns is to cause physical damage. Gun deaths and injuries impose a wide range of societal costs, while guns can bring only a narrow range of societal benefits.

Empirical inquiries about the social costs and benefits of guns are conceptually difficult and politically contentious,<sup>120</sup> though perhaps easier to conceive than the same kinds of inquiries about speech. Still, the claim that guns bring net benefits to society seems implausible, and I know of no serious attempt to defend that claim empirically. Empirical evidence supports the claim that guns impose high social costs. One study estimates the annual cost of gun violence in the United States at \$229 billion, the vast majority from indirect costs associated with gun victims' diminished quality of life and lost wages.<sup>121</sup> Another study estimates the annual cost of gun deaths alone at more than \$300 billion.<sup>122</sup> The real cost of gun violence may greatly exceed those numbers, given the broad dispersion of guns' harmful consequences.<sup>123</sup>

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<sup>118</sup> See *supra* notes 95–104.

<sup>119</sup> See *supra* notes 95–102 and accompanying text.

<sup>120</sup> See TUSHNET, *supra* note 66, at 75, 79–85 (expressing strong pessimism about the capacity of social science research to resolve questions about wise gun policy).

<sup>121</sup> See *The True Cost of Gun Violence in America*, MOTHER JONES (Apr. 15, 2015), <https://www.motherjones.com/politics/2015/04/true-cost-of-gun-violence-in-america/> [<https://perma.cc/AAP7-7Q3Z>] (reporting results of a study by public health researcher Ted Miller).

<sup>122</sup> See Timothy M. Smith, *Quantifying the Social Cost of Firearms: A New Approach to Gun Control*, CONVERSATION (July 12, 2016, 8:56 PM), <http://theconversation.com/quantifying-the-social-cost-of-firearms-a-new-approach-to-gun-control-62148> [<https://perma.cc/JN83-3PDB>].

<sup>123</sup> See David Hemenway, *Costs of Firearm Violence: How You Measure Things Matters*, in SOCIAL AND ECONOMIC COSTS OF VIOLENCE: WORKSHOP SUMMARY 60, 61–62 (2012) (positing broad, diffuse indirect costs of firearm homicides).

The major claim for the social benefits of guns, manifest in *Heller*, is that guns enable self-defense against crime.<sup>124</sup> Testing that claim presents steep methodological challenges.<sup>125</sup> The most recent academic study on the efficacy of armed self-defense, an analysis of data from the National Crime Victimization Survey for the period 2007–2011, shows that victims of violent and property crimes used guns in self-defense in less than one percent of instances where proximity to the attacker made armed self-defense possible.<sup>126</sup> Victims were injured after using guns self-defensively at the same rate as victims who used other protective strategies, such as running away, struggling, trying to attract attention, or using a different sort of weapon.<sup>127</sup> Self-defensive gun users in property crimes lost property at a substantially lower rate than users of other protective strategies but at a slightly higher rate than self-defensive users of weapons other than guns.<sup>128</sup> Overall, the study’s authors found “little evidence that [self-defensive gun use] is uniquely beneficial in reducing the likelihood of injury or property loss.”<sup>129</sup>

Perhaps measuring guns’ social impact requires a more nuanced theoretical grounding. Professors Joseph Blocher and Darrell Miller distill from some gun rights advocacy—but do not themselves endorse—an argument that guns define a “marketplace of violence”<sup>130</sup> just as speech, in Justice Holmes’s famous formulation, defines a marketplace of ideas.<sup>131</sup> Under the “marketplace of violence” theory, violence is an inevitable social fact; the state has no actual or legal monopoly on violence; and guns’ proliferation, deterrent effect, and actual use by law-abiding citizens helps maximize individuals’ and society’s safety.<sup>132</sup> One variation on this theory posits

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<sup>124</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 620 (2008) (identifying self-defense as the “core lawful purpose” of the Second Amendment).

<sup>125</sup> See *The Challenges of Defining and Measuring Defensive Gun Use*, RAND CORP. (Mar. 2, 2018), <https://www.rand.org/research/gun-policy/analysis/essays/defensive-gun-use.html> [<https://perma.cc/4RJA-QE26>].

<sup>126</sup> See David Hemenway & Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007–2011*, 79 PREVENTIVE MED. 22, 23 (2015).

<sup>127</sup> See *id.* at 24. Curiously, self-defensive gun users were less likely than users of other self-protective methods to be injured *before* taking self-protective action. Overall pre- and post-action injury rates for self-defensive gun users were virtually identical to the rates for victims who took no self-protective action at all. See *id.*

<sup>128</sup> See *id.*

<sup>129</sup> *Id.* at 22. One prominent older study purported to show that legal promotion of gun ownership dramatically reduced crime. See generally JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS (1998). Methodological criticisms, however, discredited that study’s conclusions. See, e.g., Ian Ayres & John J. Donohue III, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 STAN. L. REV. 1193, 1200–02 (2003); see also TUSHNET, *supra* note 66, at 87, 92–95 (describing the controversies around Lott’s work).

<sup>130</sup> BLOCHER & MILLER, *supra* note 8, at 155.

<sup>131</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>132</sup> See BLOCHER & MILLER, *supra* note 8, at 154–59 (explaining and analyzing the “marketplace of violence” argument).

that gun ownership, properly viewed as a civic responsibility, produces major positive externalities by fostering a social order in which the proliferation of guns prevents crime.<sup>133</sup>

The marketplace metaphor does not help the Second Amendment satisfy the benefit criterion. To begin with, the metaphor presents serious problems even in its source role as a justification for free speech. Portraying public discourse as a marketplace exaggerates the atomized and individual qualities of speech at the expense of its collective social and political functions.<sup>134</sup> The marketplace metaphor also conceals the extent to which the social reality of public discourse favors entrenched power structures.<sup>135</sup> Adapting the metaphor to the Second Amendment only compounds its failings. Justice Holmes invoked “the competition of the market” as a normatively preferable outlet for the “fighting faiths” that validate “[p]ersecution for the expression of opinions.”<sup>136</sup> In contrast, the “marketplace of violence” posits exactly what Holmes sought to banish—the willful use of force to distribute and arrange social and political power. An advocate for gun rights might respond that the “marketplace of violence” correctly takes violence as unavoidable and enlists law-abiding gun users to make the best of an unfortunate reality. Nothing we know about guns and crime, however, suggests that a regime of private gun ownership produces anything resembling an optimal societal outcome. Moreover, that argument foists off on cruel fate the choices human beings make to advance their desires through force. Some degree of violence is surely inevitable, but how much violence any society must endure is just as surely contingent. The economic marketplace generates wealth, and the “marketplace of ideas” generates knowledge. The “marketplace of violence” generates injury and death.

*Heller* claims that the Framers of the Second Amendment performed a balancing of interests to reach a constitutionally binding conclusion that gun rights provide a net social benefit.<sup>137</sup> For reasons discussed above, that claim makes little sense as a matter of historical fact or constitutional interpretation. It makes no greater sense as a normative justification for the individual Second Amendment right to keep and bear arms. The assumption that expression brings net social benefits is at least reasonable. The same assumption about guns falls somewhere between highly implausible and absurd.

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<sup>133</sup> See, e.g., Nelson Lund, *The Right to Arms and the American Philosophy of Freedom*, FIRST PRINCIPLES, HERITAGE FOUND. (Oct. 17, 2016), <https://www.heritage.org/political-process/report/the-right-arms-and-the-american-philosophy-freedom> [<https://perma.cc/EC54-USW2>] [hereinafter Lund, *The Right to Arms*].

<sup>134</sup> See MEIKLEJOHN, *supra* note 15, at 73–75 (criticizing Justice Holmes’s *Abrams* dissent for excessive individualism).

<sup>135</sup> See generally Ingber, *supra* note 95 (discussing how the “marketplace” conception skews First Amendment law in favor of established power structures).

<sup>136</sup> *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

<sup>137</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (asserting that the Second Amendment “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home”).

## 2. The Equality Criterion

Expression satisfies the equality criterion because the capacity to engage in social relation speech is something that the vast majority of people and groups possess in roughly equal measure. Societal and legal interventions end up making expression much less egalitarian than it might be, but core First Amendment doctrine still has substantial reason to view expression as more egalitarian than most forms of non-expressive action.<sup>138</sup> That reasoning does not work for guns. Almost everyone is born with the capacity to speak and to listen, free of charge. No one is born with a gun, and guns cost money. The *Heller* self-defense justification for the Second Amendment implies that legal allowance for the private possession of guns corrects a social power imbalance between criminals and crime victims. As discussed above in connection with the benefit criterion, evidence that guns empower crime victims is sparse.<sup>139</sup> Seeing how guns create and exacerbate power imbalances is much easier.

Guns, far more than words, skew the playing field. A person who starts out silent can generally respond to a verbal challenge. A person who starts out unarmed, or who wishes not to live in a condition of escalating violence, is always subordinate to an armed antagonist. The Second Amendment empowers people who choose to arm themselves over people who choose not to. Even if we somehow discount the choice not to keep and bear arms,<sup>140</sup> some people can afford more reliable, accurate, and lethal weapons than others. Even assuming that everyone should arm themselves, and that everyone can somehow achieve equal firepower, the Second Amendment accords greater power to aggressors who choose to strike first. An armed society is a petri dish of perverse incentives. Unlike speech, a capacity that society generally wants people to use, the socially optimal state of the Second Amendment right is that no one actually shoots. Not even the National Rifle Association (NRA) openly advocates a society in which hot lead flies constantly through the air. But why does one keep and bear a gun if not for the ultimate purpose of firing it? Even if we conceive of keeping and bearing arms in deterrent terms, those less inclined to shoot—those more readily deterred—will always have sound reason to fear those more inclined to shoot.<sup>141</sup> People more psychologically prone to aggression and more confident in their legal entitlement to use force will always benefit most from the power of guns.

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<sup>138</sup> See *supra* notes 103–04 and accompanying text.

<sup>139</sup> See *supra* notes 125–29 and accompanying text.

<sup>140</sup> The Second Amendment itself should cause us to credit the choice not to keep or bear arms as surely as the opposite choice to keep and bear arms. See generally Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1 (2012).

<sup>141</sup> As one commentator frames the issue, a regime of “private arms possession might put citizens in a prisoner’s dilemma,” in which the proliferation of guns creates risks that you will shoot me and thus creates incentives for me to shoot you first. See Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 NOTRE DAME L. REV. 131, 138 (2008).

To this point I've been talking about the power dynamic of the Second Amendment in terms of generic "people." In reality, that power dynamic breaks down along stark lines of race and sex. In extending the right to keep and bear arms to constrain state gun regulations, the Supreme Court spoke in righteous terms about how guns protected African American freedmen from racist violence after the Civil War.<sup>142</sup> That selective history obscures the massive role that guns play in larger and more dominant groups' subordination of smaller and more marginal groups.<sup>143</sup> We can call this phenomenon "gun bias." The contemporary gun rights movement, dominated by the NRA, is an overwhelmingly white and male political force.<sup>144</sup> The "self-defense" justification for gun rights, promoted by the NRA and embraced by the *Heller* Court, resonates with a persistent American pathology: white fear of black crime.<sup>145</sup> "Stand Your Ground" and "Castle Doctrine" laws, among the NRA's most fervent legislative priorities, promote white racial privilege<sup>146</sup> without actually deterring crime.<sup>147</sup> Gun bias carries over from legislation to law enforcement. White men can saunter through public spaces, flaunting high-powered rifles in "open carry" protests, while police attack lawful black gun owners as criminals.<sup>148</sup> Unchecked gun violence ravages communities of color even as white enclaves go about their peaceful affairs.<sup>149</sup>

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<sup>142</sup> See *McDonald v. City of Chicago*, 561 U.S. 742, 775–76 (2010).

<sup>143</sup> See *infra* notes 163–67 and accompanying text.

<sup>144</sup> The NRA does not report demographic information on its members. Although political affiliation correlates only roughly with race and sex, we can gain some insight from the finding that 24% of Republicans and Republican leaners belong to the NRA, while only 11% of Democrats and Democratic leaners do. See PARKER ET AL., *supra* note 85, at 14. At the same time, 77% of NRA members are Republicans or Republican leaners. See Parker, *supra* note 88.

<sup>145</sup> See *supra* note 63 and accompanying text.

<sup>146</sup> See Mario L. Barnes, *Taking a Stand?: An Initial Assessment of the Social and Racial Effects of Recent Innovations in Self-Defense Laws*, 83 *FORDHAM L. REV.* 3179, 3192–200 (2015) (documenting the disparate racial effects of Stand Your Ground laws).

<sup>147</sup> See Cheng Cheng & Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence? Evidence From Expansions to Castle Doctrine*, 48 *J. HUM. RESOURCES* 821, 823 (2013) (finding that adoption of Stand Your Ground laws had no deterrent effect on burglary, robbery, or aggravated assault while actually increasing homicide rates by 8%); Megan Miller & John Pepper, *Assessing the Effect of Firearms Regulations Using Partial Identification Methods: A Case Study of the Impact of Stand Your Ground Laws on Violent Crime*, 83 *LAW & CONTEMP. PROBS.* (forthcoming 2020) (draft 20–21) (draft on file with the author) (finding evidence that Stand Your Ground laws increase violent crime and murder and finding uncertain effects on assault and robbery).

<sup>148</sup> See Adam Serwer, *The NRA's Catch-22 for Black Men Shot by Police*, *ATLANTIC* (Sept. 13, 2018), <https://theatlantic.com/ideas/archive/2018/09/the-nras-catch-22-for-black-men-shot-by-police/570124> [<https://perma.cc/4LZ6-E785>] (critique of rights advocates for encouraging armed self-defense by African Americans but not defending armed African Americans shot by police).

<sup>149</sup> See Yolanda T. Mitchell & Tiffany L. Bromfield, *Gun Violence and the Minority Experience*, *NAT'L COUNCIL ON FAM. REL.* (Jan. 10, 2019), <https://www.ncfr.org/ncfr-report/winter-2018/gun-violence-and-minority-experience> [<https://perma.cc/5SKA-ZWS2>] (discussing data that show communities of color as disproportionately harmed by gun violence).

Likewise, while gun rights advocates extol the benefits of guns for vulnerable women,<sup>150</sup> guns in reality cause a dramatic increase in the terror and the body count of male attacks on female domestic partners.<sup>151</sup> Moreover, the NRA has long pushed restoration of repressive gender hierarchies, rather than gun regulation, as a cure for gun violence.<sup>152</sup> Gun rights advocates masquerade as friends of the powerless, attacking gun regulation as an elitist project of effete liberalism.<sup>153</sup> The realities of gun violence and gun bias, however, indict the gun culture as a hive of white male power over everyone else.

Gun rights advocates insist that guns empower minority communities.<sup>154</sup> Guns, by this reasoning, are a great equalizer. Without guns, minority groups are vulnerable to an oppressive majority's superior numbers; guns eliminate the majority's advantage.<sup>155</sup> That argument, though, blithely ignores the reality that, in an armed society, the majority has at least as much access to guns as minorities do.<sup>156</sup> The outnumbered minority simply becomes the outgunned minority. Consider the decision of African American civil rights leaders in the 1950s and 1960s, most prominently Dr. Martin Luther King, Jr., to pursue a literally disarming strategy of nonviolent resistance and moral suasion.<sup>157</sup> White society today lauds that decision for its principle and

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People of color are far likelier than white people to see gun violence as a “very big problem” nationally (73% of Blacks, 62% of Hispanics, 44% of Whites) and in their local communities (49% of Blacks, 29% of Hispanics, 11% of Whites). See PARKER ET AL., *supra* note 85, at 54.

<sup>150</sup> See, e.g., Nelson Lund, *Not a Second Class Right: The Second Amendment Today*, NAT'L CONST. CTR.: INTERACTIVE CONST., <https://constitutioncenter.org/interactive-constitution/in-terpretation/amendment-ii/interps/99#not-a-second-class-right-the-second-amendment-today-nelson-lund> [<https://perma.cc/V4SX-BF8H>] (asserting that “the most vulnerable people—including women, the elderly, and those who live in high crime neighborhoods—are among the greatest beneficiaries of the Second Amendment”).

<sup>151</sup> Compilations and discussions of social science evidence on men's gun violence against female domestic partners appear in *Guns and Violence Against Women: America's Uniquely Lethal Domestic Violence Problem*, EVERYTOWN FOR GUN SAFETY (Apr. 1, 2019), <https://everytownresearch.org/reports/guns-violence-women-americas-uniquely-lethal-domestic-violence-problem/> [<https://perma.cc/BD7X-4URX>]; Kerry Shaw, *12 Facts that Show How Guns Make Domestic Violence Even Deadlier*, TRACE (Aug. 22, 2016), <https://www.thetrace.org/2016/08/domestic-violence-gun-facts/> [<https://perma.cc/E3MW-J2TH>].

<sup>152</sup> See WILLIAMS, *supra* note 47, at 185–86 (discussing the NRA's anti-feminist rhetoric).

<sup>153</sup> See, e.g., Lund, *The Right to Arms*, *supra* note 133, at 14 (assailing “people in the upper middle class [who] can safely advocate the disarmament of their less fortunate fellow citizens without fear that such regulations will have any significant effect on themselves”).

<sup>154</sup> See WILLIAMS, *supra* note 47, at 220–41 (discussing and critiquing movements among subgroups of Jews, women, and African Americans to promote armed self-defense). A recent exemplar of the argument is CHARLES E. COBB, JR., *THIS NONVIOLENT STUFF'LL GET YOU KILLED: HOW GUNS MADE THE CIVIL RIGHTS MOVEMENT POSSIBLE* (2017).

<sup>155</sup> See WILLIAMS, *supra* note 47, at 220–21.

<sup>156</sup> See *id.* at 243.

<sup>157</sup> See, e.g., Jon Else, *The Civil Rights Movement Had One Powerful Tool that We Don't Have*, NATION (Mar. 27, 2017), <https://www.thenation.com/article/the-civil-rights-movement-had-one-powerful-tool-that-we-don-t-have/> [<https://perma.cc/89JX-G8WK>].

its decency,<sup>158</sup> but the choice of nonviolence also followed pragmatic logic about how African Americans could most likely achieve political and legal victories over an entrenched and largely hostile white majority.<sup>159</sup> Certainly armed self-defense has helped African Americans protect themselves against terroristic threats.<sup>160</sup> However, as gun rights advocates rarely acknowledge, the terrorists come armed in the first place. Armed resistance has emerged only as African Americans' least bad response. The idea that a minority group should have access to guns on the same terms as the majority makes a good deal of sense. That idea animates my proposal below for reconceiving the Second Amendment.<sup>161</sup> The Supreme Court and gun rights advocates, however, appear to care about gun equality only as a rhetorically convenient incident of a gun proliferation regime that, in fact, disproportionately harms minority groups. The Second Amendment right to keep and bear arms does not satisfy the equality criterion.

Those concerned with the purposes and effects of the First Amendment's protections for expressive freedom might pause to consider how this analysis of the Second Amendment's inequitable character reflects back on the current state of First Amendment law. One way to frame the Supreme Court's increasingly anti-egalitarian free speech jurisprudence<sup>162</sup> is to observe that present First Amendment doctrine makes speech more like guns. Indeed, Justice Kagan recently excoriated the Supreme Court's conservative majority, in a case that equated making workers pay for unions' collective bargaining services with compelled speech, for "weaponizing the First Amendment."<sup>163</sup> The Roberts Court's similarly ideologically skewed uses of First Amendment law to increase the power of wealth in politics,<sup>164</sup> to shield commercial

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<sup>158</sup> That was not always the case. *See, e.g.*, Peniel E. Joseph, *America's Nonviolent Civil Rights Movement Was Considered Uncivil by Critics at the Time*, WASH. POST (July 4, 2018), [https://www.washingtonpost.com/news/post-nation/wp/2018/07/04/the-civil-rights-movement-might-have-been-nonviolent-but-to-critics-it-was-considered-uncivil/?noredirect=on&utm\\_term=.f6270efc8c91](https://www.washingtonpost.com/news/post-nation/wp/2018/07/04/the-civil-rights-movement-might-have-been-nonviolent-but-to-critics-it-was-considered-uncivil/?noredirect=on&utm_term=.f6270efc8c91) [<https://perma.cc/62C6-F8W9>] (discussing widespread contemporaneous white criticism of the Civil Rights Movement).

<sup>159</sup> Strategic thinking about the efficacy of nonviolence permeates the history of the Civil Rights Movement. *See generally* TAYLOR BRANCH, *AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965–68* (2006).

<sup>160</sup> *See generally, e.g.*, AKINYELE OMOWALE UMOJA, *WE WILL SHOOT BACK: ARMED RESISTANCE IN THE MISSISSIPPI FREEDOM MOVEMENT* (2013) (discussing armed resistance in the face of white supremacy).

<sup>161</sup> *See* discussion *infra* Part III.

<sup>162</sup> *See supra* notes 109–11 and accompanying text.

<sup>163</sup> *See* *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

<sup>164</sup> *See* *McCutcheon v. FEC*, 572 U.S. 185, 187 (2014) (using the First Amendment to strike down federal limits on the aggregate amount any person may contribute to federal candidates in a given election cycle); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 722 (2011) (using the First Amendment to strike down a state law that set funding levels for publicly funded candidates based on the spending levels of their privately funded opponents); *Citizens United v. FEC*, 558 U.S. 310, 312 (2010) (using the First Amendment to strike down a federal bar on corporate electoral spending).

actors from economic regulation,<sup>165</sup> and to advantage abortion opponents<sup>166</sup> complicates the task of justifying First Amendment speech rights. Perhaps the right to keep and bear arms inevitably subordinates more than it liberates; but constitutional expressive freedom can do better. We should deplore and resist a constitutional order that makes the right to speak up more like the right to shoot down.

The power dynamics of the self-defense justification for the right to keep and bear arms bring the discussion of justifications for that right full circle, from the non-political back to the political. The self-defense justification, in failing the equality criterion, betrays a stronger political polarity than initially appeared when we considered self-defense as an alternative to the manifestly political anti-tyranny justification.<sup>167</sup> Even if we reject the idea that the Second Amendment should protect our capacity to overthrow a tyrannical government, we might accept the idea that the amendment should empower us to defend ourselves when the government's law enforcement apparatus refuses or fails to defend us. However, rendering the right to keep and bear arms as a constitutional entitlement to armed self-defense serves to privatize the kind of coercive power that liberal theory axiomatically associates with the state.<sup>168</sup> That move entails a politically momentous revision, or abandonment, of the liberal social contract.<sup>169</sup> The political stakes of the self-defense justification end up high and fraught.

The attempt to justify the individual right to keep and bear arms in terms of non-political value does no better than political value justification at validating the parity premise. The grounds on which our legal culture justifies strong First Amendment protection for non-political, "social relation" speech<sup>170</sup> do not offer an effective template for justifying strong Second Amendment protection of the right to keep and bear arms. Perhaps a better empirical understanding of the world might improve the *Heller* Court's self-defense justification under the benefit and equality criteria; or perhaps we should assess the self-defense justification under some criteria more normatively salient than those two; or perhaps a more normatively appealing non-political justification than self-defense is available to validate the right to keep and

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<sup>165</sup> See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011) (using the First Amendment to strike down a state's bar on pharmaceutical companies' use of physicians' patient-prescription records for marketing drugs).

<sup>166</sup> Compare *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361, 2368, 2371, 2373–75, 2378 (2018) (using the First Amendment to strike down a state law that required anti-abortion "crisis pregnancy centers" to disclose to patients the nature and limits of the clinics' services and the availability of abortion services), with *McCullen v. Coakley*, 573 U.S. 464, 469, 471, 480–81, 486–87, 497 (2014) (using the First Amendment to strike down a state-mandated "buffer zone" designed to protect patients at medical facilities that provide abortion services).

<sup>167</sup> See *supra* notes 112–18 and accompanying text.

<sup>168</sup> See Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 728 (2011).

<sup>169</sup> See *id.* at 728–32.

<sup>170</sup> See discussion *supra* Section II.A.

bear arms. On the other hand, perhaps we should recognize that the individual right to keep and bear arms cannot be justified in anything like the ways we justify the First Amendment freedom of expression. The parity premise is wrong, and courts should not enforce the Second Amendment right to keep and bear arms with the same force as the First Amendment's protections for expressive freedom.

### III. AN EQUAL RIGHT TO KEEP AND BEAR ARMS

A major problem with the present state of Second Amendment law is the absence of much linkage between theoretical justification and what courts have actually been doing.<sup>171</sup> If the Second Amendment deserves to be enforced less robustly than the First Amendment, that doctrinal outcome should take a form that aligns with the particular justificatory limits on the individual right to keep and bear arms. The Supreme Court may soon address this problem, either by commanding stronger enforcement of the Second Amendment or by validating weaker enforcement.<sup>172</sup> For now, one form my critical analysis might sensibly lead Second Amendment law to take is protection not of a substantive right to keep and bear arms against general government regulation but rather of an *equal* right to keep and bear arms against *inequitable* government regulation. On this construction, courts would treat the Second Amendment less like the First Amendment and more like the Equal Protection Clause.<sup>173</sup> I will call this formulation the “equal right to arms.”

Some First Amendment scholars,<sup>174</sup> joined at times by the Supreme Court,<sup>175</sup> have posited a central role for distributive justice in developing the scope and shape of constitutional expressive freedom. They argue, in essence, that expressive rights are too important to let the government inequitably distribute opportunities for exercising those rights. The Supreme Court has largely rejected First Amendment equality arguments, partially due to the Justices' ideologically driven skewing of First Amendment law toward reinforcement of existing power dynamics<sup>176</sup> and partially for the

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<sup>171</sup> See BLOCHER & MILLER, *supra* note 8, at 150–54.

<sup>172</sup> See *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45, 55 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (2019) (No. 18-280).

<sup>173</sup> U.S. CONST. amend. XIV, § 1, cl. 2.

<sup>174</sup> See Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). My own writing about the First Amendment has advocated strong attention to distributive outcomes. See, e.g., Gregory P. Magarian, *Market Triumphalism, Electoral Pathologies, and the Abiding Wisdom of First Amendment Access Rights*, 35 HOFSTRA L. REV. 1373 (2007).

<sup>175</sup> See, e.g., *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 308 (1968) (finding a First Amendment right for speakers to access certain private property generally open to the public), *overruled by* *Hudgens v. NLRB*, 424 U.S. 507 (1976); see also cases cited *supra* notes 105–06.

<sup>176</sup> See *supra* notes 162–66 and accompanying text.

simpler reason that the First Amendment straightforwardly supports the substantive protection of expressive rights against government regulation. At least in theory, ensuring equity in the distribution of a government burden becomes unnecessary when the government is substantively barred from imposing the burden on anyone. In contrast, if we cannot justify substantively protecting the right to keep and bear arms against government regulation, then protecting that right against inequitable regulation may make sense. On this view, the Constitution should prohibit the government, absent some compelling or substantial reason,<sup>177</sup> from disarming particular people or communities—for example people of color, women, and poor people—in ways that don't apply to other people or communities.

The equal right to arms has a template in the “fundamental interest” branch of equal protection doctrine. Under fundamental interest equal protection, government denials of equal opportunities to exercise certain especially important, rights and interests can only survive constitutional challenges if the government can satisfy heightened scrutiny, even though the Constitution enumerates no protection for those rights and interests.<sup>178</sup> The fundamental interest doctrine thus provides a parallel track to strict scrutiny for equal protection claims that runs alongside the more familiar “suspect classification” track.<sup>179</sup> The most important and persistent subjects of the fundamental interest doctrine have been the right to vote<sup>180</sup> and the right of access to judicial process.<sup>181</sup> The Court in the 1970s arrested the fundamental interest doctrine's development by refusing to extend the doctrine to rights of material support<sup>182</sup> and education.<sup>183</sup> Even so, strains of the fundamental interest doctrine resonate in the Court's recent recognition of a broad doctrinal basis for same-sex couples' Fourteenth Amendment right to marry.<sup>184</sup>

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<sup>177</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (discussing the Court's failure to establish a standard of review for Second Amendment jurisprudence). In this rough sketch of a doctrinal proposal, I take no position on whether “equal right to arms” claims would properly be subject to strict scrutiny or to some less stringent standard or review.

<sup>178</sup> See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966).

<sup>179</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 519 (1996) (striking down on grounds of sex discrimination a state's maintenance of a male-only military academy); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (striking down on grounds of racial discrimination a state's racially segregated public education system).

<sup>180</sup> See, e.g., *Harper*, 383 U.S. at 665 (striking down a state poll tax under the Equal Protection Clause despite the absence in the federal Constitution of any textually explicit right to vote in state elections).

<sup>181</sup> See, e.g., *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (holding under the Equal Protection Clause that a state must provide an indigent criminal defendant on appeal with a transcript of the trial or its equivalent).

<sup>182</sup> See *Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (rejecting an equal protection challenge to a state's imposition of a flat cap on welfare benefits).

<sup>183</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 2 (1973) (rejecting an equal protection challenge to a state's reliance on local property taxes to finance public education).

<sup>184</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (conceptualizing the right of same-sex couples to marry in terms of both liberty and equality).

Transforming the right to keep and bear arms from a substantive protection to an equality guarantee presents an issue of constitutional interpretation. The equal right to arms has little to do with the “well regulated Militia” of the Second Amendment’s preamble, and an equality guarantee doesn’t squarely bar the government from abridging “the right of the people to keep and bear Arms” as the Amendment’s declarative clause appears to require.<sup>185</sup> However, when we read the preamble and the declarative clause together, the equal right to arms stands closer to the text’s mandate than the *Heller* right of armed self-defense does. The most straightforward implication of what this Article has posited as the correct reading of the Second Amendment is that “the right of the people to keep and bear Arms” should have no legal effect in present circumstances.<sup>186</sup> Many people could live very easily with that implication, but many others could not. If we want the Second Amendment to have legal effect in present circumstances, then courts must either invent a new meaning for the Amendment, as *Heller* did, or make some rough compromise with the constitutional text. Aside from my other objections to *Heller*, I doubt its approach is sustainable. Over the long run, protection of an enumerated constitutional right seems unlikely to persist in complete isolation from the text that supposedly enumerates the right. Rejection of the *Heller* Court’s invention leaves only textual compromise.

The equal right to arms could emerge from either of two textual strategies. First, we could construe the Second Amendment as directly commanding the equitable approach. On this understanding, the Second Amendment’s protection for “the right of the people to keep and bear Arms” in present circumstances presumptively bars the government from disadvantaging discrete persons’ or groups’ capacity to arm themselves.<sup>187</sup> Second, we could acknowledge the Second Amendment itself as vestigial but treat it as making “the right of the people to keep and bear Arms” sufficiently important to warrant protection under the Equal Protection Clause. These textual strategies have parallel strengths and weaknesses. The Second Amendment strategy keeps protection for the right to keep and bear arms located in the textual provision that enumerates that right, but it requires a conceptual leap to get from that text to an equality right. Conversely, the equal protection strategy has no conceptual problem fitting a new equality right into a longstanding equality doctrine, but it leaves the Second Amendment itself as little more than an artifact. On balance, I think the equal protection strategy works more directly and clearly. The equal protection strategy might seem to make an interpretive move similar to Professor Amar’s gambit, which I’ve criticized, of locating a substantive individual right to keep and bear arms in the Fourteenth Amendment’s Privileges or Immunities Clause.<sup>188</sup> However, merely

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<sup>185</sup> U.S. CONST. amend. II.

<sup>186</sup> See Magarian, *supra* note 5, at 99.

<sup>187</sup> Cf. BURT NEUBORNE, MADISON’S MUSIC: ON READING THE FIRST AMENDMENT 20 (2015) (suggesting, based on the Second Amendment’s central concern with military power, that the Amendment today means only “that all qualified persons . . . enjoy an equal right” to serve in the U.S. military) (internal quotation marks omitted).

<sup>188</sup> See discussion *supra* notes 60–61 and accompanying text.

giving a new dimension to an established equality doctrine would require far less invention, and would raise far lesser legal and practical concerns, than creating a new unenumerated, substantive right.

An equal right to arms would raise several challenging doctrinal questions. What would constitute an impermissibly inequitable regulation of firearms? The racially specific disarming of African Americans during Reconstruction provides an easy example,<sup>189</sup> but present equal protection doctrine would reject that sort of regulation as a suspect classification, making resort to the fundamental interest principal unnecessary. What about a generally applicable regulation, like a municipal handgun ban, challenged as disproportionately affecting a discrete group, like residents of high-crime neighborhoods? Perhaps a court could sustain an as-applied challenge to such a regulation or even order the government to deploy its public safety resources more equitably. Doesn't every gun regulation apply inequitably in some meaningful sense? To state the problem more broadly: In a society already permeated with guns, wouldn't a constitutional mandate of equal access to firearms push against any conceivably effective firearm regulation, because no such regulation could succeed in restricting everyone's access to guns? Conversely, wouldn't even the most perfect realization of the equal right to arms sustain the power imbalance that favors people with a greater propensity for aggression?

These are all important questions for which I lack precise answers. In general, I suspect that the conceptual challenges of an equal right to arms would play out along similar lines to the arguments we see in current Second Amendment doctrine, even aside from the likelihood that most state legislatures would continue to protect ever more extravagant conceptions of gun rights. Courts would develop the equal right to arms in light of broader political arguments about the social costs of firearms and the value of owning them. More important than any doctrinal change is the persistence of deeply challenging social conditions: The United States is practically drowning in guns,<sup>190</sup> and our government seems incapable of providing enough security against violence to eliminate our fervor—however reasonably or unreasonably grounded—for armed self-defense. Compared to the *Heller-McDonald* regime of substantive Second Amendment rights,<sup>191</sup> the constitutional stakes of the equal right to arms would start out considerably lower. The shift to an equality approach would make figuring out the formidable social problems related to guns and gun violence less about constitutional abstraction and more about policy judgment. That would be at least a small step in the right direction.

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<sup>189</sup> See *McDonald v. City of Chicago*, 561 U.S. 742, 771–73 (2010).

<sup>190</sup> U.S. civilians own more than 393 million legal and illegal guns, or about six guns for every five people. See AARON KARP, SMALL ARMS SURVEY, BRIEFING PAPER, ESTIMATING GLOBAL CIVILIAN-HELD FIREARMS NUMBERS at 3–4 (June 2018), <http://www.smallarmssurvey.org/fileadmin/docs/T-Briefing-Papers/SAS-BP-Civilian-Firearms-Numbers.pdf> [<https://perma.cc/9S3R-5Y2T>].

<sup>191</sup> See *McDonald*, 561 U.S. at 791; *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

## CONCLUSION

The political process provides the paradigmatic justification for the First Amendment's protection of free expression.<sup>192</sup> That sort of justification is not available for the recently minted Second Amendment individual right to keep and bear arms, because the idea that the Second Amendment licenses armed insurrection against a tyrannical government goes too far.<sup>193</sup> If we try instead to justify gun rights along the same lines we follow to justify constitutional protection for non-political speech, we run into different problems. Constitutionally protected speech broadly satisfies two normative criteria: it provides net societal benefits, and most people begin with a roughly equal capacity to use it.<sup>194</sup> The right to keep and bear arms satisfies neither the benefit criterion nor the equality criterion. As to benefit, the keeping and bearing of arms appears likely to yield a net societal harm.<sup>195</sup> As to equality, the keeping and bearing of arms reinforces and exacerbates inequities in power.<sup>196</sup> The inability to justify the Second Amendment like the First Amendment suggests that the Second Amendment does not warrant the same vigorous enforcement as the First Amendment. One way to reconcile the Second Amendment with this failure of justification would be to treat it as a different sort of right than the First Amendment—a right that does not guarantee substantive protection against government regulation but rather mandates equality in regulation.<sup>197</sup> Construing the Second Amendment to protect an equal right to arms would diminish the amendment's scope in absolute terms, but it might free the amendment to make the sort of positive contribution to our constitutional and political order that the First Amendment historically has made.

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<sup>192</sup> See discussion *supra* Section I.A.

<sup>193</sup> See discussion *supra* Section I.B.

<sup>194</sup> See discussion *supra* Section II.A.

<sup>195</sup> See discussion *supra* Section II.B.1.

<sup>196</sup> See discussion *supra* Section II.B.2.

<sup>197</sup> See discussion *supra* Part III.